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CITY OF TUCSON  
RECEIVED

12 MAY 11 P3:30

OFFICE OF THE  
CITY CLERK

WRITER'S DIRECT DIAL  
(520) 529-4261

WRITER'S E-MAIL ADDRESS  
sbrearcliffe@rllaz.com

May 11, 2012

***Via Hand Delivery***

Dave Deibel  
Tucson City Attorney's Office  
955 W. Alameda, 7<sup>th</sup> Floor  
Tucson, AZ 85701

Clerk's Office  
City Hall 9th Floor  
255 West Alameda  
Tucson, Arizona 85701

RECEIVED  
OFFICE OF CITY ATTORNEY  
MAY 11 2012  
CIVIL DIVISION  
TUCSON, ARIZONA

Re: Notice of Breach of April 1, 2002 Sublease Agreement

Dear Dave:

This letter is a brief reply to your letter of November 14, 2011, by the Rio Nuevo Multipurpose Facilities District ("the District") regarding the issues at the TCC and confirmation and notice of claim regarding Tenant's breach of the Sublease dated April 1, 2002. This response was previously held back in light of the ongoing mediation. While the District remains pursuing the mediation in good faith, it nonetheless deems it prudent to address the points raised in your letter *seriatim* and confirm the default claim.

1. City's Breach of TCC Sublease Response:

First, you state that there is "absolutely no evidence of any failure of the City to maintain the [TCC] in good condition and repair, other than references to a list the City compiled describing various items in need of repair or replacement." Please let me know what information other than a tenant's own admission of failure to repair and replace that you might need. Unless you are going to challenge the accuracy of the City-hired and paid Director of the TCC and other TCC employees as to their observations, they seem to chronicle well the City's abject failure under the Sublease.

Second, you state that the list documenting the City's failure of repair was put together "in large part because RN refuses to contribute any money, including bond money that was specifically put aside for TCC improvements, to assist the City in addressing these issues." This is not accurate nor is the reason for the compiling of the list relevant. The deficiencies are the responsibility of the City under the Sublease. Rio Nuevo is not obligated to spend any money -

\* ALSO ADMITTED IN MASSACHUSETTS, NEW YORK AND WASHINGTON, D.C. \*\*ALSO ADMITTED IN CALIFORNIA AND OREGON \*\*\* ALSO ADMITTED IN COLORADO  
+ ALSO ADMITTED IN WASHINGTON, D.C. ♦ ALSO ADMITTED IN TEXAS

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bond money or otherwise - to make these repairs and replacements. Further, given that you admit that the City needs assistance in the repair areas listed, it seems to be an admission that they are, indeed, the City's responsibility.

Third, whether or not the TCC is "open for business" is not the test to determine whether the City has breached the Sublease. It has breached the Sublease if it failed to cure the failure to make repairs and replacements as required and Rio Nuevo acknowledged nothing by modifying the Sublease - indeed, all that happened was that the City re-confirmed its obligations.

Finally, as to your itemization of the "over \$24,000,000" spent on the TCC property "owned" by the District, that would be a shocking number if true. It is neither true nor accurate. Attached as Exhibit 1 is a response to your table. In sum, the "central plant" is owned by the City, not the District, the photovoltaic solar system was a lease/purchase and the product of bonds - it is not a fixture, and it is secured, apparently, by property the City does not own (unbeknownst to the issuers). The other expenditures are precisely the types of things the City should have been properly maintaining and repairing all along. Nonetheless, most of the money used to further your itemization was Rio Nuevo's money, not the City's. Your letter does not help the City's position.

The Sublease rental rate was established by the City as a break-even lease, to cover the debt service. That is why the City took on the maintenance, repair and replacement obligations. It is failing to meet these obligations.

The City remains in default under the Sublease - now, by virtue of your letter, it is admittedly so.

## 2. Confirmation of Claim.

By letter directed to Kelly Gottschalk as Finance Director of the City of Tucson pursuant to Article XI, Section 11.1 of the April 1, 2002 Sublease Agreement between the City of Tucson and the District, the District gave notice to the City of Tucson of its default under the Sublease Agreement. Exhibit 2, attached.

In that letter, and pursuant to the terms of the Sublease, and without waiving any of its rights under the Sublease, the District demanded that the City immediately address all repair, maintenance, and replacement Action Items identified by former TCC Director Thomas Obermaier in the Action Item Sheet attached to the letter. Pursuant to Section 9.1(ii) of the Sublease, the City was given 30 days from the date of that Notice to cure and comply with its obligations under the Sublease.



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By letter of November 14, 2011, the Office of the City Attorney gave notice that it would not perform the repairs within the 30 days as required by the Sublease. Exhibit 3. By that letter, and by the subsequent failure to cure by making repairs required by the Sublease, the City of Tucson breached the Sublease.

To the extent a further Notice of Claim were required beyond the October 13, 2011 Default letter and attempt to resolve the dispute - by providing the contractual opportunity to cure -- please treat this letter as a Notice of Claim pursuant to A.R.S. § 12-821.01, in response to the City's failure timely to cure. Notwithstanding its earlier failure to cure, the City can fully resolve this dispute and remedy the breaches by immediately addressing all repair, maintenance, and replacement Action Items identified in the October 13, 2011 letter and generally bringing the facility into full compliance with the law within 30 days. In the event the City needs a monetary figure for which this matter may be settled, please use the figure of \$25 million. Though we do not believe that sum will fully remedy all of the maintenance, repair and replacement needed on the TCC, it is an offer of compromise.

While it is recognized that the District and the City may benefit from a mutually agreeable settlement as a result of the months-long mediation, the matter of the TCC lease default is not a part thereof. Thank you for your time and attention.

Sincerely,

A handwritten signature in blue ink, appearing to read 'S E Brearcliffe', with a stylized flourish at the end.

Sean E. Brearcliffe

SEB\lg

cc: Jodi Bain

Enclosures (2)

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